

James P. Pachl
Attorney at Law

717 K Street, Suite 529
Sacramento, California, 95814

Tel: (916) 446-3978

Fax: (916) 244-0507

jpachl@sbcglobal.net

March 13, 2008

Arne Simonsen, Chair, and Commissioners
Linda Fiack, Executive Director
California Delta Protection Commission
14215 River Road
Walnut Grove, CA 95690

RE: Commission Meeting Thursday March 27, 2008, 5:30 p.m., Agenda Item 15
Commission consideration of revised Old Sugar Mill Project, Clarksburg

Dear Chairman Simonsen and Commissioners,

I represent the Concerns Citizens of Clarksburg, an unincorporated association of residents of Clarksburg, CA, and some individuals who are concerned about the proposed Old Sugar Mill Specific Plan and related County approvals for residential and commercial development (collectively, the "OSMSP" or "Project"), located in the unincorporated community of Clarksburg, Yolo County, in the Delta Primary Zone. My clients continue to oppose the Project as revised and approved by Yolo County on March 11, 2008. The Project remains inconsistent with Delta Protection Act ("Act") and Land Use and Resource Management Plan.

The Old Sugar Mill project was approved by the Yolo County Board of Supervisors on October 24, 2006. The Concerned Citizens and the Natural Defense Resources Council ("NRDC") thereafter appealed the Board's approval to the Delta Protection Commission, on the ground that the Project was inconsistent with eleven policies of the Land Use and Resource Management Plan for the Primary Zone of the Delta.

At hearing on January 25, 2007, the Commission found that the Project was consistent with eight of the Policies raised on appeal and inconsistent with three, as follows: Land Use Policy No. 3, Land Use Policy No. 4, and Levee Policy No. 3. On February 22, 2007, the Commission adopted Findings, which laid out the reasons why the Commission found the Project to be inconsistent with these three Policies. Public Resources Code § 29771 provides that a proposed local government action appealed to the DPC under Section 29771 shall not be effective until the Commission has adopted written findings, based on substantial evidence in the record, that the action is consistent with the Delta Protection Act, the Resource Management Plan, and approved portions of the local government general plan that implements the Resource Management Plan and the Act. Therefore, the County's approvals of the Project remain ineffective until the County submits a revised Project to the Commission and the Commission adopts written

Findings that the revised Project is consistent with the Act, Resource Management Plan and the portions of the Yolo General Plan which implement the Resource Management Plan and Act.

Thereafter Yolo County modified and approved a revised Project, by vote of the Board of Supervisors on March 11, 2008, and has submitted the revised Project for review by the Commission. Yolo County asserts that the changes incorporated in the revised Project adequately address the Commission's concerns stated in its Findings, and asks the Commission to find on March 27, 2008, that the Project is now consistent with the three Policies (Land Use Policies No. 3 and 4, and Levee Policy No. 3).

In fact revisions to the Project are minor and fail to address the Commission's concerns which were laid out in its written Findings approved February 22, 2007. The Commission's Findings as to Land Use Policies 3 and 4, and Levee Policy 3 are attached as **EXHIBIT A**.

A. The revised Project remains inconsistent with Land Use Policy 4

Land Use Policy 4 (14 Calif. Code of Regulations 20060(d):

"New non-agricultural residential development in the Primary Zone, if needed, shall be located within the existing Primary Zone communities where support infrastructure and flood protection are already provided." (emphasis added).

- a. Flood protection for the Project site is not "already provided", as required by Policy 4 and County fails to show that it will be provided

The Commission's Findings pertaining to LU Policy 4 state that "flood protection for the project area is uncertain and may be below the 100-year level," and that "if the outcome of such studies [required by County MM 4.7.8.a] require improvements that are economically infeasible there are no assurances that the project proponent or any other entity will perform the needed improvements." This remains the situation with the revised Project. County offers no evidence that flood protection meets the 100-year standard now or that it will meet the 100-year standard in the future.

County's assertion that revised MM 4.7.7a bring the project into compliance with LU Policy 4 is without basis. Revised MM 4.7.7a differs from the original only by requiring that if FEMA has not re-determined the Base Flood Elevation ("BFE", level of 100-year flood) before the issuance of building permits, then an unidentified engineer retained and paid by an unidentified party (very likely the Applicant) will determine the BFE based on best available information, consultation with relevant State and Federal agencies, etc. The final determination of the BFE would be by the County, unless FEMA earlier re-determines the BFE. The habitable floors of houses would then be elevated 1 foot above the BFE.

County's staff report to the Supervisors states that by requiring the habitable area be elevated one foot above the BFE (whether determined by FEMA or County), the habitable area "probably" will be elevated 11 to 13 feet, according to County's Staff Report, p. 34. The County's engineer could also conclude that much less elevation is needed. Elevation of the habitable area of homes to 11 feet above grade creates the illusion of safety from the 100-year flood event when in fact there is no evidence that the homes could withstand the lateral force of

currents which would accompany a deluge from a breach of the Sacramento River levee next to or in the vicinity of the Project, even if the habitable area were above the flood level (until the flood current demolishes the house).

County's revised MM 4.4.7a states that homes would comply with the County Flood Prevention Damage Ordinance. However, the construction standards of the Yolo County Flood Hazard Reduction Ordinance, § 8-3.501 provides no objective standards which assures that structures will be built strongly enough to ensure adequate protection of structures against the lateral force of current of floodwaters rushing inland from a levee break, other than an engineer's subjective conclusion that the standard is met. The 100-year surface river elevation is at least ten feet higher than the elevation of the Project site, and a levee failure at that level would have catastrophic consequences for any persons and structures caught in the path of the deluge, for a considerable distance from the levee break (which could be expected to widen very rapidly as it was removed by the current). Aerial photos of New Orleans after the Katrina flood showed that homes were totally or partially demolished in large areas adjacent to the levee breaks.

By creating the illusion of complete safety against the 100-year flood, revised MM 4.7.7a may encourage persons to buy homes on the Project site which they might otherwise reject if the habitable areas were elevated only four feet above ground, as allowed by the original MM 4.7.7a, yet they may be no safer with the habitable area elevated 11 feet above grade if the force of the current accompanying a flood event is enough to demolish the structures, or if they had the misfortune to be caught on ground level or in automobiles when the flood hit.

Most obviously, though, County's new requirement for purportedly "flood-proof" homes and for "feasible" levee upgrades, even if performed, does not meet the requirement of LU Policy 4 that "flood protection" of the Project site is "already provided."

- b. County has failed to show that "new nonagricultural residential development" on the Project site is needed.

The Commission found insufficient evidence that 162 residences are needed in Clarksburg, pointing out that the Project would more than double the size of Clarksburg. The revised project is for 126 new residences, which would almost double the size of Clarksburg, which County states has 140 residences. County's asserts that there are 456 residences in the Clarksburg General Plan Area, but those are scattered throughout 35,000 acres and are not concentrated close to Clarksburg.

In fact there is a very large amount of vacant land designated and now being actively planned for urban development projects in the Southport area of West Sacramento, approximately eight to nine miles northward and closer to urban employment centers. Driving time from Clarksburg to West Sacramento (Southport) is 12-15 minutes via Jefferson Blvd. Unlike Clarksburg, planning is underway to upgrade the levees protecting West Sacramento, including Southport.

County's assertion that "new housing on the Project site may reduce the conversion of local farmland to ranchettes," is unsupported conjectural. County offers no evidence that persons willing to pay the very high cost of purchasing an agricultural-size parcel for their homesite

would have any interest in the high and medium-density suburban-style homes of the Project on very small parcels.

County's assertion that "the Project would create nearly 600 new jobs" is irrelevant to LU Policy 4, which affects only "new non-agricultural residential development." There is no evidence that any new jobs (other than temporary construction jobs and a few housekeeping and gardening jobs) would be created by the residential component of the Project affected by LU Policy 4. LU Policy 4 does not affect the Project's commercial activities, which may provide jobs.

- c. The FEMA one-hundred year standard does not provide an adequate level of flood protection that complies with LU Policy 4.

Please see the excellent letter of Earthjustice submitted to the Commission, and the studies and literature accompanying that letter, incorporated herein by reference. In particular, the Commission is urged to review "*A California Challenge – Flooding in the Central Valley, A Report to the California Department of Water Resources, State of California, October 15, 2007,*" a report by an independent panel of nationally-recognized experts on flood hazard and floodplain management commissioned by the California Department of Water Resources, and the report of the Blue Ribbon Task Force 2008, "*Our Vision for the California Delta, January 29, 2008,*" both attached to the letter of Earthjustice submitted to the Supervisors on March 6, 2008.

B. The revised Project remains inconsistent with Levee Policy 3

Levee Policy 3 (14 Calif. Code of Regulations 20100(c):

"... local government shall prudently carry out their responsibilities to regulate new construction within flood hazard areas to protect public health, safety, and welfare. Increased flood protection shall not result in densities beyond those allowed under zoning and general plan designations in place on January 1, 1992, for lands in the Primary Zone."

County repeats the same contentions which it argued to support its assertion that the revised Project complies with LU Policy P-4 (e.g.: construction standards, levee study, flood protection plan to be implemented only to the extent "feasible", as determined by County).. County's arguments fail for the same reasons.

In its Findings, the Commission held:

"Allowing up to 162 residences to be built within the project areas prior to recertification of the levee for 100-year flood protection reduces the level of public health and safety in the area by increasing the number of people at risk of flooding and is inconsistent with Levees Policy 3." (emphasis added).

County fails to show how reduction of the number of residential units to 126 makes the project consistent with Levee Policy 3. County continues to argue that the project does not result in increased densities beyond those allowed under the zoning and general plan designations in place

on January 1, 1992 - an argument which the Commission considered and rejected in its previous Findings.

C. The revised Project remains inconsistent with Land Use Policy 3

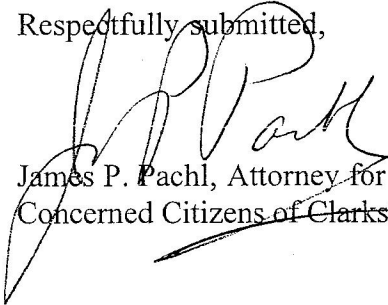
Land Use Policy 3 (14 Calif. Code of Regulations 20060(c):

"New residential, recreational, commercial, or industrial development shall ensure that appropriate buffer areas are provided by those proposing new development to prevent conflicts between any proposed use and existing agricultural use. Buffers shall adequately protect integrity of land for existing and future agricultural uses. Buffers may include berms and vegetation, as well as wetbacks of 500 to 1000 feet."

The revised Project has relocated the western boundary of the buffer to the western edge of the neighboring County right of way, so that crops could be planted to the road's edge, and added a berm and hedgerow. Otherwise, the buffer remains unchanged from the original Project, and the Commission's concerns stated in its previous Findings have not been addressed (except for the relocation of the western boundary of the buffer).

For the reasons stated above and in the letter of Earthjustice, the Commission should find that the revised Project fails to comply with Land Use Policies 3 and 4 and Levee Policy. Undersigned reserves the right to submit additional written and oral argument at the hearing on this matter.

Respectfully submitted,


James P. Pachl, Attorney for
Concerned Citizens of Clarksburg

Attach: Commission Findings
adopted 2/22/07